

**SANITIZED DEC. – 03-544 RU – BY – GEORGE V. PIPER – SUBMITTED FOR
DECISION ON BRIEFS – 03/19/04 – ISSUED – 05/20/04**

SYNOPSIS

PURCHASERS' USE TAX -- PRECAST PRISON HOUSING UNITS ARE "MODULAR DWELLINGS" -- Pursuant to W. Va. Code § 11-15A-2b [1998], Petitioner is responsible for use tax on only the value (cost) of the materials and building supplies used in the manufacture and installation of precast prison inmate housing units, which are "modular dwellings," as well as on the costs for preparing the site for permanent installation of same, but not on the labor or mark-up involved in manufacturing such "modular dwellings," *see* W. Va. Code § 11-15-2b(c) [1998].

**FINAL DECISION
ON LEGAL ISSUES**

The Field Auditing Division of the West Virginia State Tax Commissioner's Office conducted an audit of the books and records of the Petitioner. Thereafter, on July 12, 2002, the Director of this Division of the Commissioner's Office issued a purchasers' use tax assessment against the Petitioner. The assessment was for the period of April 1, 1999, through March 31, 2002, for tax, interest, through July 31, 2002, and no additions to tax, for a total assessed tax liability. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked September 12, 2003, the Petitioner filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

After filing its petition for reassessment, the Petitioner remitted full payment of the tax portion of the assessment, in protest, to stop the running of interest on the

assessment. Accordingly, the petition for reassessment has been converted to a petition for refund, under the provisions of W. Va. Code § 11-10-8(c) [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and 121 C.S.R. 1, § 61.3.3 (Apr. 20, 2003).

At the hearing, Petitioner's counsel stated that should the Tax Commissioner prevail, Petitioner would still owe what represents the unpaid interest portion of the assessment.

FINDINGS OF FACT

1. Petitioner builds modular components used in the construction of prisons, hotels, and college dormitories.

2. The tax controversy at issue in this matter relates solely to the construction of the new federal prison in West Virginia (the "Prison").

3. The modular-construction Prison project entailed construction of custom-made "precast concrete housing units."

4. With respect to the modular housing units, Petitioner poured concrete into specially designed forms and installed bunks, cabinets, electrical conduits, plumbing and light fixtures, HVAC grills, doors and other major components at Petitioner's plant located out-of-state.

5. The modular housing units and other precast components were not built on a permanent chassis but instead were transported to the work cite over public highways

utilizing specialized trailers and then placed at the appropriate location and installed as part of the Prison using cranes.

6. In the construction industry, the Prison is referred to as a “modular constructed facility.”

7. The facility was built to model codes other than the National Manufactured Housing Construction and Safety Standards Act of 1974.

8. Federal prisoners eat, sleep, and otherwise reside at the Prison.

9. Modular contractors, like Petitioner, compete with “on-site” builders (stick-built masonry and poured-in-place concrete contractors) for jobs like the construction of the Prison.

10. Petitioner does on occasion build modules not used in a project, whereupon Petitioner sells such modules to unrelated third-party purchasers at a price less than the cost of materials.

11. The assessment assumes that all costs incurred by Petitioner in fabricating and transporting modules incorporated into the Prison project, plus an internal markup, are included in the use tax base.

12. Approximately forty (40) percent of the amounts included in the assessment computations reflect Petitioner’s out-of-pocket materials costs; if Petitioner were subject to use tax solely on materials incorporated into the housing unit modules and other components incorporated into the Prison, the assessments would be reduced by \$. Petitioner’s Exhibit 6.

13. The Tax Commissioner’s representative admitted at the evidentiary hearing that page 1 of the “Audit Findings” did not describe the basis of the adjustments

reflected in the assessments; instead, the assessment is based on an assumption that Petitioner manufactures a “manufactured product” and uses the manufactured product in contracting.

14. At the hearing, the Tax Commissioner’s sole witness could not identify the “manufactured product” that Petitioner manufactures, beyond stating that he believed it was precast concrete and never considered whether Petitioner was engaged in manufacturing a “modular dwelling,” within the meaning of W. Va. Code § 11-15-2b(c) [1998].

DISCUSSION

Both sides have focused initially and to a significant extent upon the “integrated manufacturer/contractor” rule to determine whether it applies to the Petitioner’s activities in question, and if so, to what extent, because the Petitioner manufactured items and facilities outside the State of West Virginia and then transported same to West Virginia for use in its contracting business. W. Va. Code § 11-15A-2a [1989]. Although the parties’ arguments on that issue are both intriguing and somewhat novel, in reality the final result hinges totally on another statute, which involves whether Petitioner’s construction of the Prison project constitutes “modular dwelling construction.”

W. Va. Code § 11-15A-2b [1998], entitled, “Tax on the manufacture, sale and installation of modular dwellings,” states as follows:

(a) Notwithstanding the provisions of section two-a of this article, persons engaged in the manufacture and sale or the manufacture, sale and installation of a modular dwelling shall pay the tax imposed by this article only on the value of the building supplies and materials used in the

manufacture and installation of the modular dwelling and the preparation of the site for permanent installation, and not on the labor involved in such activities. For purposes of this section, the value of the building supplies and materials shall be the actual cost of the building supplies and materials. If the manufacturer asserts an exemption at the time of purchase of the building supplies and materials, the manufacturer shall remit the tax due on the value of the building supplies and materials used in the manufacture of the modular dwelling at the time of sale of the modular dwelling. If the manufacturer pays the tax at the time of purchase of the building supplies and materials, the manufacturer is responsible for maintaining records evidencing payment of the tax. Failure to maintain such records will result in the tax being assessed to the manufacturer.

(b) Persons engaged in the sale and installation of a modular dwelling shall pay the tax imposed by this article on only the value of the materials used in the manufacture and installation of the modular dwelling and the preparation of the site for permanent installation and not on the labor involved in such activities. For purposes of this section, the value of the materials used in the manufacture of the modular dwelling shall be the actual cost of the materials and building supplies to the manufacturer as delineated on the invoice to the purchaser. If the actual cost of the materials is not available, then the cost of the materials used in the manufacture of the modular dwelling shall be sixty percent of the total cost of the modular dwelling. A credit will be given to the purchaser for any sales or use tax that has been lawfully imposed by another state and paid by the manufacturer on the purchase of building supplies and materials used in the manufacture of the modular dwelling. If the manufacturer pays the tax at the time of purchase of the building supplies and materials, the manufacturer is responsible for maintaining records evidencing payment of the tax and delineating the amount on the invoice. Failure to maintain such records will result in the credit being denied.

(c) *Definition of modular dwelling.* - For purposes of this article, a modular dwelling shall include, but no [be] limited to, single and multi-family houses, apartment units and commercial dwellings comprised of two or more sections without a permanent chassis, built to a state or model code other than the National Manufactured Housing Construction and Safety Standards Act of 1974, which are primarily constructed at a location other than the permanent site at which they are to be finally assembled and which are shipped to the site with most permanent components in place.

(emphasis added)

At the hearing, the State Tax Commissioner's witness acknowledged that the applicability of W. Va. Code § 11-15A-2b to Petitioner's construction of the housing units at issue was never considered. On the other hand, Petitioner's counsel directly addressed each element of W. Va. Code § 11-15A-2b(c) and posited the following:

1. The Prison is a modular constructed facility.
2. The Prison is a dwelling where individuals eat, sleep, and otherwise reside, generally for three or more years.
3. The Prison consisted of more than one section-component.
4. The Prison components were without a permanent chassis.
5. The Prison was built to a state or model code other than the National Manufactured Housing Construction and Safety Standards Act of 1974.
6. The Prison components were primarily constructed at a location other than the permanent site at which they are to be finally assembled with most permanent components in place.

The State Tax Commissioner never did introduce any *evidence* to contradict Petitioner's proof regarding these elements, and argued only, in connection with the definition of the term *dwelling*, that § 11-15A-2b should be strictly construed.

Tax Commissioner's counsel argued that the prison modular units are not in the traditional sense, single or multiple family houses nor are they traditional apartments and, therefore, for a federal penitentiary to be a modular dwelling, it must first be a "commercial" dwelling for purposes of W. Va. Code § 11-15A-2b(c) [1998].

This conclusion ignores the wording of the West Virginia Code that a *dwelling* for this purpose "shall *include, but not [be] limited to*,...houses, apartment units and commercial dwellings[.]" W. Va. Code § 11-15A-2b(c)[1998] (emphasis added).

Therefore, the sample list of types of dwellings (houses, apartments, and commercial dwellings) in the West Virginia Code is explicitly not exhaustive.

In another context the West Virginia Legislature has directly addressed what constitutes a *dwelling*. W. Va. Code § 61-3-1 [1997] provides in relevant part:

(a) Any person who willfully and maliciously sets fire to or burns... any dwelling... shall be guilty of arson in the first degree....

(b) As used in subsection (a) of this section:

(1) 'Dwelling' means any building or structure intended for habitation or lodging, in whole or in part, regularly or occasionally, and shall include, but not be limited to, any house, apartment, hotel, dormitory, hospital, nursing home, jail, prison, mobile home, house trailer, modular home, factory-built home or self-propelled motor home[.]

(emphasis added) Moreover, the MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th Ed. 2001) defines a *dwelling* as "a shelter... in which people live." Similarly, the RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2nd Ed. 1998) defines *dwelling* as "a building or place of shelter to live in."

Research discloses no "single-family, non-transient use" standard applied generally to the term *dwelling* in West Virginia law, as proposed now by the Commissioner. The latter standard would, in any event, contradict W. Va. Code §11-15A-2b(c) [1998], in which *dwelling* expressly includes *but is not limited to* "commercial dwellings," among other types of housing units. That standard is also not supported by the historical background to W. Va. Code § 11-15A-2b [1998]. In addition, as discussed above, the West Virginia statutes and common dictionary definitions of the term "dwelling" do not lend support to the "single-family, non-transient use" standard.

It is also noted that the Tax Commissioner's reliance, in part, upon the "incidental installation" regulations dealing with hook-up costs for a doublewide mobile home is misplaced because Petitioner is not a mobile home retailer.

Finally, "[l]aws imposing a license or tax are strictly construed and when there is doubt as to the meaning of such laws they are construed in favor of the taxpayer and against the State." Syllabus point 3, *Coordinating Council for Independent Living, Inc. v. Palmer*, 209 W. Va. 274, 546 S.E.2d 454 (2001) (internal citation omitted).

In light of the foregoing, the Federal Prison facility is indeed *modular* and it is a *dwelling*. Accordingly, the *modular dwelling* treatment of W. Va. Code § 11-15A-2b [1998] applies to the Petitioner's construction of the Federal Prison facility. Under W. Va. Code § 11-15A-2b [1998], the Petitioner is to pay purchasers' use tax on its costs for materials and building supplies and for site preparation for permanent installation, but not on its manufacturing labor costs or mark-up.

Therefore, the Petitioner is entitled to a refund. On the current state of the record, however, this tribunal is not absolutely sure as to the amount of the refund due. Thus, the parties are to submit to this tribunal their computation(s) as to the amount of the refund due consistent with this Final Decision on the Legal Issues.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon a petitioner-taxpayer, to show that the petitioner-taxpayer is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter has carried the burden of proof with respect to the issue of the applicability of W. Va. Code § 11-15A-2b [1998] to the activities in question. *See* 121 C.S.R. 1, § 69.2 (Apr. 20, 2003).

DIRECTIVES RESPECTING COMPUTATION OF THE AMOUNT OF TAX DUE

1. In accordance with 121 C.S.R. 1, § 73.1.1, the above shall constitute a statement of the opinion of the West Virginia Office of Tax Appeals determining the issues in the above-captioned matter;

2. The West Virginia Office of Tax Appeals is withholding entry of its decision for the purpose of requiring the parties to submit computations of the amount of refund due consistent with the opinion set forth above.

3. As stated above, because the Petitioner constructed a modular dwelling, W. Va. Code § 11-15A-2b applies and Petitioner is only legally responsible for use tax on its material costs, etc.

4. Within thirty (30) days of service of this Final Decision on the Legal Issues, the parties shall meet in an attempt to reach an agreement with respect to the computation of tax refund due in accordance with the above-stated Decision;

5. If the parties are unable to agree upon an amount of refund due, then in accordance with the provisions of 121 C.S.R. 1, § 73.2.1, and within forty-five (45) days of service of this Decision, either party may submit a computation of the amount of tax refund that it believes is correct, and serve its computation on the West Virginia Office of Tax Appeals and on the other party;

6. If only one party submits a computation of the amount of the refund it believes is correct, the Office of Tax Appeals shall proceed in accordance with the provisions of 121 C.S.R. 1, § 73.2.2;

7. If both parties submit a computation of the amount of the refund they believe is correct, either in accordance with the provisions of 121 C.S.R. 1, § 73.2.1 (where both parties file their computations simultaneously) or 121 C.S.R. 1, § 73.2.2 (where one party files its computation and the other party files its computation in response), the Office of Tax Appeals shall proceed in accordance with the provisions of 121 C.S.R. 1, § 73.2.3;

8. If, after the submission of computations of the amount of the refund due by both parties, either party believes that an evidentiary hearing is necessary, within ten (10) days of receipt of the opposing party's computation, it shall submit a request for an evidentiary hearing, clearly and succinctly setting forth the grounds upon which its request is based, and describing the nature of any evidence that it intends to introduce.

Upon receipt of an agreed upon computation of the refund due, pursuant to 121 C.S.R. 1, § 73.1.2, or upon resolution of any dispute in the computations of tax refund submitted by the parties, pursuant to 121 C.S.R. 1, §§ 73.2.1 & 2, the West Virginia Office of Tax Appeals will enter its computation of the refund.